INDEX

	Page
Statutes involved	1
Statement	2
Argument:	
I. The decision below is not based on a construction of indictment, but involves a question of statutory construction	3
A. The decision is not based upon any alleged absence in the indictment of a showing of pecuniary loss	3
B. The opinion below is based upon a construction of "material fact" as used in Section 35, Criminal Code	11
II. The decision below is based upon a construction of the statute upon which the indictment is founded	12
Conclusion	16

26481—37

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 97

THE UNITED STATES OF AMERICA, APPELLANT

v.

BEN KAPP, BERT COX, TOM WOODS, ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FROM THE WESTERN DISTRICT OF OKLAHOMA

REPLY BRIEF ON BEHALF OF APPELLANT

In view of the order of October 11, 1937, noting probable jurisdiction in this cause, the Government did not add to its opening brief an exposition of the jurisdiction of this Court. However, since the brief submitted by the appellees addresses itself principally to that question, the Government submits this reply brief.

STATUTES INVOLVED

Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, 19 U. S. C., title 18, sec. 682:

A writ of error [1] may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:

From a decision or judgment quashing, setting aside, or sustaining a demurrer to any indictment, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded.

Judicial Code, sec. 238, U. S. C., title 28, sec. 345:

A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections and not otherwise: * * * (2) Section 682 of Title 18, where the decision of the district court is adverse to the United States.

STATEMENT

By way of preliminary, the Government wishes to clarify the nature of the representation made by appellees. They represented to the Chicago Commission firms that the various producers of the pigs were still the owners thereof, whereas in fact the pigs had been acquired outright by appellees and were owned by them. The Government desires to

[1] The writ of error has been abolished and appeal substituted therefor. Act of Jan. 31, 1928, c. 14, 45, Stat. 54, as amended by Act of April 26, 1928, c. 440, 45 Stat. 466; U. S. C., title 28, secs. 861a, 861b.

modify any statements in its opening brief which indicate a different view of the facts.[2]

ARGUMENT

I

THE DECISION BELOW IS NOT BASED ON A CONSTRUCTION OF THE INDICTMENT, BUT INVOLVES A QUESTION OF STATUTORY CONSTRUCTION

A. *The decision is not based upon any alleged absence in the indictment of a showing of pecuniary loss*

Appellees contend that the decision below rests upon the ground that the indictment did not sufficiently allege that the conspiracy contemplated any pecuniary loss to the Government.

The Government does not deny that, under the ruling of *United States* v. *Cohn,* 270 U. S. 339, a conspiracy to violate Sec. 35 of the Criminal Code must relate to a "fraudulent causing of pecuniary

---

[2] Thus the phrase "pretending to be the original producers" (Opening Brief, p. 6, line 3) should be omitted. The last sentence of Point I of the summary of argument (Br. —, p. 8) should read: "In view of these facts the representation made by appellees that the hogs to be sold to the Secretary of Agriculture were owned by the producers was clearly "material" within the meaning of Section 35 of the Criminal Code. And the second full sentence on page 25 of the Brief should read: "Appellees had knowledge of the regulations they desired to circumvent which made it clear that the Field Auditor, whose duty it was to enforce the Act and approve the vouchers for payment, regardless of his opinion as to its constitutionality, would be influenced by the representation that the hogs to be sold were then owned by the producers.

or property loss" (p. 347). The Government does insist that careful scrutiny of the entire record discloses that the indictment sufficiently demonstrates that the conspiracy contemplated pecuniary loss to the Government, and further reveals that neither the parties nor the court below even considered this "pecuniary loss" factor as a possible ground of decision.

First. The indictment clearly sets out facts showing the pecuniary loss to the Government contemplated by the conspiracy. Under the Secretary's regulations (R. 8–9), in effect during the Emergency Hog Marketing Program, "benefit payments" were made to original producers, but not to registered market traders or speculators, by means of a purchase of pigs at a "premium price" (R. 9, 10, 11, 12). The purchase of pigs at a "premium price" greater than the market price was executed not as a means of securing pigs, whose disposition only raised a harassing problem which was solved by donations to the poor on relief,[3] but as a means of paying benefits to the depressed agricultural producers. The nature of the pecuniary loss planned by the conspirators is clear: The Government, intending to lend assistance to a largely indigent class would have been duped into a gift to an entirely different class, one of speculators who were not intended to be aided.

[3] See *Emergency Hog Marketing Program*, Report to the Senate by the Secretary of Agriculture, S. Doc. No. 140, 73d Cong., 2d Sess., p. 14.

The fraud and loss are as real as that worked on a citizen who is induced to give money, allegedly for a charitable cause, to one who intends all the while to devote the money to an entirely different purpose. Reference may appropriately be made to the reasoning of the Court in *Janes et al.* v. *Trustees of Mercur University,* 17 Ga. 515, 519–520:

> When, therefore, on application to one for a donation to such a school, a representation is made to him that the school is to be a manual labor school, the representation is one of a material kind. If, therefore, the representation be acted upon and a donation made, and then the manual labor part of the school be abolished, an injury, by means of the false representation, is inflicted on the donor. ***He is deprived of his money.*** The transaction amounts to a fraud on him. [Italics added.]

But appellees contend that the indictment does not show that the Government paid more than the market price (Br. p. 11). Apart from the inherent improbability of a suggestion that appellees arranged the elaborate conspiracy and misrepresentations for the purpose of obtaining a price which they could have secured directly on the open market, it is clear from the indictment that the Secretary, in purchasing hogs for his own account, paid more than the current market price. The indictment sets out that the Secretary was making "benefit payments," and promulgated regulations

to assure that the benefit payments would reach the producers. Reference is repeatedly made to purchases at a premium price" (R. 9, 10, 11). This is not a conclusion of law phrased merely in the generic terms used to define the offense, see *United States* v. *Cruickshank,* 92 U. S. 542, 558, 559, such as might be a bare, unexplained statement that the conspirators proposed to cause the Government "pecuniary or property loss," but it is a statement of the fact that the Secretary paid to producers prices which constituted a premium,[4] or bounty, i. e., prices higher than the current market price. Had appellees urged this matter in the lower court, or submitted a bill of particulars, the United States could have offered more detailed allegations on the point. For the fact is clear, and from sources which may be judicially noticed: The Secretary was paying more than the commercial market price.[5] Appellees' suggestion that

[4] The primary meaning of the word "premium", as defined in Webster's New International Dictionary (2d ed. 1936), p. 195, includes: "1. A reward or recompense; * * * bounty; as a *premium* for good behavior or scholarship, for discoveries, etc."

[5] See *Emergency Hog Marketing Program*, Report to the Senate by the Secretary of Agriculture, S. Doc. No. 140, 73d Cong., 2d Sess., passim. An economic appraisal by Administration officials pointed out that "The purchase of light pigs and sows at a price well above the prevailing market will add to the farmers income. * * *" *Id.*, p. 17. And so the plan called for purchase of "light-weight hogs weighing from 25 to 100 pounds at premium prices established by the Administration." *Id.*, p. 18. See also *Corn-Hog Ad-*

"There is nothing in the indictment alleging the Government paid more than its own price for the hogs it got" (Br. p. 11), continues the error of

---

justment (issued by Agricultural Adjustment Administration, Jan. 1935), p. 37.

The Secretary's schedule of prices, Chicago basis, was $9.50 per cwt. for pigs weighing from 25–30 lbs., $9.25 per cwt. for 31–35 lb. pigs, etc., with $.25 per cwt. less for each additional 5 lb. group. The lowest price was $6.00 per cwt. for pigs from 96 to 100 lbs. *Id.*, p. 20. The indictment sets forth that appellees' pigs were invoiced at $9.00 per cwt. 36–40 lb. pigs), $8.75 per cwt. (41–45 lb. pigs), $8.50 per cwt. (46–50 lb. pigs), $6.75 per cwt. (81–85 lb. pigs). (R. 12, 13, 14.) With these prices should be contrasted the commercial market price for light pigs weighing from 100 to 130 pounds. On the dates when appellees' shipments were invoiced, September 11, 12, 16, 1933, the commercial market prices were $2.50–$3.75 (September 11, 1933), $2.75–$3.85 (September 12, 1933), $3.25–$4.25 (September 15, 16, 1933). *Daily Livestock Market Report*, Chicago, for September 11, 1933, September 12, 1933, September 15, 1933, issued by Bureau of Agricultural Economics, Department of Agriculture. At all times mentioned the Secretary was paying $6.00 per cwt. for 100-lb. pigs.

It should be noted that the daily reports disclose that on the commercial market the price per cwt. varies directly with the weight of the pig; for processing purposes the lighter pigs are considered less economical to handle. See *Report on Emergency Hog Marketing Program*, S. Doc. No. 140, 73d Cong., 2d Sess., p. 32; *Agricultural Adjustment*, Report of Administration of the Agricultural Adjustment Act May 1933 to February 1934 (U. S. Dept. of Agriculture, 1934), p. 110. The Secretary reversed this rule and increased the price per cwt. as the total weight of the pig went down, because he desired to reduce the supply of mature hogs on the subsequent winter market (and increase the price), rather than to prepare them for commercial use. *Report on Emergency Hog Marketing Program*, S. Doc. No. 140, 73d Cong., 2d Sess., p. 13.

26481—37—2

regarding the transaction simply as a purchase of hogs, rather than as a grant of benefits. The Secretary's regulations explicitly withhold the benefit of premium prices from non-producers.

Second. The demurrer,[6] which may be supposed to have suggested to the district court the ground of its opinion, does not advert to this matter, although it sets out several other specific objections to the indictment—duplicity in charging more than one offense; failure to show any common action between the defendants; failure to charge acts constituting an offense in view of the invalidity of the Agricultural Adjustment Act and of the regulations promulgated thereunder by the Secretary of Agriculture; lack of territorial jurisdiction of the trial court. The only ground which might conceivably embrace the contention now made is the preliminary, catch-all objection that the indictment is not "sufficient in law."

Third. The District Judge, who signed the order allowing appeal (R. 22–23), did not proceed upon a construction of the indictment as suggested by appellees. Utilizing a ground suggested by the demurrer,[7] the District Court rested on the failure

---

[6] Reference here is made to the demurrer of defendants Cox, Hopper, Woods and Green (R. 15, 17–18). The demurrer filed by McLarty states merely that the indictment fails to state facts constituting an offense (R. 15). Kapp filed no demurrer, but the district court viewed the case as if he had filed one, and sustained his demurrer along with the others (R. 20–21).

[7] Paragraphs 4, 5, 6; R. 17–18.

of the indictment to charge an offense,[8] in view of the invalidity of the Agricultural Adjustment Act. No mention is made of a failure to allege or show pecuniary loss to the Government. A sentence to the effect that the hogs were shipped, and that the bills were otherwise correct (R. 20), was designed merely to narrow the issue, and to focus on the crucial representation relied on by the Government. It is true, as the District Judge states, that the bills would have been entirely correct had the representation that the pigs were sold by the original producers been correct.

---

[8] Despite appellees' elaborate analysis, it is clear that this holding alone demonstrates that a question of statutory construction is involved. Where the district court holds that the acts charged do not constitute a violation of a statute, the Court has necessarily construed the statute, and a direct appeal lies. *United States* v. *Patten*, 226 U. S. 525, 535; *United States* v. *Birdsall*, 233 U. S. 223, 230; *United States* v. *Nixon*, 235 U. S. 231, 235; *United States* v. *Mosley*, 238 U. S. 383; *United States* v. *Cohn*, 270 U. S. 339, 342–343. The rule would apply to a ruling quashing a murder indictment because of the omission of an allegation of malice aforethought. The construction would be that the murder statute requires malice aforethought as an element of the offense: The construction would be obviously correct, and an appeal to review it might be dismissed as frivolous, but there would be a "construction" of the statute below. Indeed, appellees do not really deny that the sustaining of the demurrer for failure to charge an offense constitutes a construction. Their contention is that the only construction involved is the interpretation of Section 35 to require pecuniary loss, a question settled by *United States* v. *Cohn*, 270 U. S. 339. With that contention the Government, of course, disagrees.

The short answer to the contention that the court below relied on the lack of "pecuniary loss" is the fact that it relied on the unconstitutionality of the Agricultural Adjustment Act. Whether or not the Act was valid, the conspirators, if successful, would have obtained the same price for their hogs. Whether or not the Act was valid, the pecuniary loss to the Government was exactly the same. Since the court below relied on the unconstitutionality of the Act, it could not have relied on an alleged absence of pecuniary loss.[9]

---

[9] Although the Government insists that the District Court did not rely on any pecuniary loss feature, the Government contends that even if the District Court had sustained the demurrer on this ground, there would be a question for this Court to review. The appellees apparently assume (Br. p. 6) that such a ruling would be a construction of the indictment, binding on this Court. It is true that this Court is bound by the District Court's interpretation of the meaning of an indictment, i. e., the determination as to precisely what facts were alleged therein. See *United States* v. *Yuginovich*, 256 U. S. 450, 461; *United States* v. *Colgate & Co.*, 250 U. S. 300, 306; *United States* v. *Davis*, 231 U. S. 183, 187. However, in this case there would be no real question as to what facts were charged in the indictment. The Secretary was clearly buying pigs at prices higher than commercial market prices. The Government concedes that if the conspiracy had been successful, the Secretary would have received pigs of the weight and soundness represented. But if, on the basis of the latter fact, the District Court had determined that no "pecuniary or property loss" had been caused, this would have been a ruling of law on conceded facts, a ruling construing an element of the offense defined by Section 35, an element read into the statute by *United States* v. *Cohn*, 270 U. S. 339, 347, *supra*. If the District Court had adopted this ground, the proper construction of "pecuniary or property loss" would have

Apparently, appellees attempt to link their theory of the case to the District Court's reliance on the unconstitutionality of the Act by stating that "if it [the Government] could do nothing even with the *right* hogs, it has sustained no pecuniary loss in getting the wrong ones." (Br., p. 11). This passage is obscure. The District Court nowhere intimated that the Government was powerless to use hogs it purchased from producers. Moreover, it may be admitted that hogs purchased from producers and from speculators have the same hog value, even in the possession of the Government. As explained above, the pecuniary loss comes not from any deficiency in the hogs shipped, but from the fact that appellees attempted to induce the Government to grant benefits to members of a class the Government did not wish to aid.

B. *The opinion below is based upon a construction of "material fact" as used in Section 35, Criminal Code*

The brief opinion of the District Court tersely states the *ratio decidendi* (R. 20):

> This [fact that the hogs did not originate from the sources represented by the defend-

---

been subject to review in this Court, and the Government could have presented its argument to the effect that the "pecuniary loss" would have come, not from a deficiency in the hogs shipped, but from the fact that the hog purchase was merely a means of giving bounty to producers and that the conspiracy contemplated that the Government would be duped into granting benefits to members of a class the Government did not desire to assist.

> ants] ceases to be a *material fact,* if the provisions of the Agricultural Adjustment Act are void. In other words, the representations, which are alleged to have been made, cease to be misrepresentations of *material facts* when the act itself falls. [Italics added.]

The use of the expression "material fact" obviously refers to the requirement of Section 35 of the Criminal Code, which punishes one who shall willfully "falsify * * * a material fact." The major premise of the opinion is that facts which are "material" only by virtue of a statute, may not be considered material if the statute is invalid. It is this construction of "material fact", as used in Section 35, of which the United States complains.[10]

II

THE DECISION BELOW IS BASED UPON A CONSTRUCTION OF THE STATUTE UPON WHICH THE INDICTMENT IS FOUNDED

Appellees contend (Br., p. 3) that the indictment is founded on Section 37 of the Criminal Code (conspiracy statute), whereas the construction below is of Section 35 of the Criminal Code.

---

[10] The estoppel point in appellant's opening brief also involves a question of construction, though a question of construction not considered by the court below. Under this point, appellant is in effect urging that in any event "material fact" should be construed to embrace any fact made material by a statute which, though unconstitutional generally, cannot be attached by the person who made the misrepresentation.

Sufficient reply is found in the long line of cases involving indictments for conspiracy (under Section 37) to commit a substantive offense defined in another act. In each of these cases this Court unhesitatingly reviewed decisions construing the statute defining the substantive offense, and itself considered the correct interpretation thereof. *United States* v. *Keitel,* 211 U. S. 370; *United States* v. *Forrester,* 211 U. S. 399; *United States* v. *Herr,* 211 U. S. 406; *United States* v. *Biggs,* 211 U. S. 507; *United States* v. *Stevenson,* 215 U. S. 200; *United States* v. *Munday,* 222 U. S. 175; *United States* v. *Davis,* 231 U. S. 183; *United States* v. *Foster,* 233 U. S. 515; *United States* v. *Holte,* 236 U. S. 140; *United States* v. *New South Farm,* 241 U. S. 64; *United States* v. *Morehead,* 243 U. S. 607; *United States* v. *Hutto,* 256 U. S. 524; *United States* v. *Janowitz,* 257 U. S. 42; *United States* v. *Bowman,* 260 U. S. 94; *United States* v. *Walter,* 263 U. S. 15. The last two cases are especially significant, for they involved conspiracies to violate Section 35 of the Criminal Code.

Appellees suggest that all these cases assumed jurisdiction without perceiving the problem now raised. However, several of these opinions seem to have envisioned the question now presented, and to have made adequate preparation for it. The applicable doctrine suggested by these cases is that an indictment for conspiracy to commit an offense is "founded," within the meaning of the Criminal

Appeals Act, both on Section 37 and on the statute defining the substantive offense contemplated by the conspiracy, although the applicable punishment is that provided in Section 37 alone.

Thus, in *United States* v. *Bowman,* 260 U. S. 94 (indictment for conspiracy to defraud under Section 35), Chief Justice Taft stated, in the course of his opinion (p. 100): "What is true of these sections in this regard is true of *Section 35, under which this indictment is drawn.*" (Italics added.) Similarly, in *United States* v. *Walter,* 263 U. S. 15, Justice Holmes, who referred to the third count of an indictment as "based upon Section 37 of the Criminal Code" stated (p. 16–17) that "the first two counts are brought under the Act of October 23, 1918, c. 194; 40 Stat. 1015, *amending Section 35 of the Criminal Code and, taken with Section 37,* making it a crime to conspire to present for, or to obtain, payment of a fraudulent claim against 'any corporation in which the United States of America is a stockholder.'"

The same reasoning is suggested in *United States* v. *Foster,* 233 U. S. 515, 523 (indictment referred to as "being based on Section 206 of the Criminal Code"); *United States* v. *Janowitz,* 257 U. S. 42, 46–47 ("facts * * * are sufficient to constitute crimes under Sections 37 and 148 of the Criminal Code * * * properly construed").

Even upon the assumption that the indictment was "founded" on Section 37, compare *United*

States v. *Hutto,* 256 U. S. 524, 525,[11] this Court would have jurisdiction to review the same questions as could be presented on the assumption that the indictment was founded on both §§ 35 and 37. Section 37 prohibits a conspiracy to commit an offense against the laws of the United States. It is apparent that a proper construction of "offense against the laws of the United States" may require a preliminary construction of the statute defining the offense. See *United States* v. *Stevenson,* 215 U. S. 200, 203;[12] *United States* v. *Morehead,* 243

[11] The Court stated that it has issued a writ of error under the Criminal Appeals Act to review an order sustaining a demurrer to an indictment *under Section 37, Criminal Code,* charging a conspiracy to violate Section 2078, Rev. Stats. * * * *." [Italics added.]

[12] "Inasmuch as we have already held that Congress, in making the assistance of contract laborers into the United States a misdemeanor, has made the same a crime indictable as such under the Immigration Act of 1907, it must necessarily follow that if two or more persons, as is charged in the indictment under consideration, conspire to assist such importation, they do conspire to commit an offense against the United States within the terms of Section 5440 of the Revised Statutes of the United States."

U. S. 607.[13] In this case the indictment under Section 37 could be dismissed only because it failed to show a conspiracy to commit an "offense," under Section 35. The construction of Section 35 is integrally involved in a proper construction of Section 37, and an appellate review of the construction of Section 37 would entail a construction of Section 35.

The statements of this Court tend to indicate that a conspiracy indictment is "founded" on the statute defining the substantive offense as well as on Section 37. But it is apparent that, whichever is the correct theory with respect to the statute on which the indictment is "founded", this Court can review the construction of "material fact" as used in Section 35.

CONCLUSION

For the reasons stated, it is submitted that, under the Criminal Appeals Act of 1907, the Court has jurisdiction to review the cause, and to determine the issues presented in the Government's

[13] In this case the existence of a conspiracy to commit subornation of perjury (Sec. 126, Criminal Code) depended on whether or not an oath in a false affidavit was "authorized to be administered," which in turn depended on the validity of a regulation issued under the Homestead Law, authorizing the oath. To determine the question the Court enunciated the proper construction of the Homestead Law. It would seem probable that the Homestead Law was not the statute upon which the indictment was founded, and that it was being construed merely as a step in the proper construction and application of Sec. 126.

opening brief, and that accordingly the judgment of the District Court should be reversed and the cause remanded with instructions to overrule the demurrer.

Respectfully submitted.

STANLEY REED,
Solicitor General.
BRIEN MCMAHON,
Assistant Attorney General.
W. W. BARRON,
Special Assistant to the Attorney General.
JOHN M. SULLIVAN,
Attorney.
HAROLD LEVENTHAL,
Special Attorney.

NOVEMBER 1937.

U. S. GOVERNMENT PRINTING OFFICE: 1937